

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JONATHAN AGRAMONTE, on behalf of  
himself and all other similarly situated  
employees,

Case No.: 14-cv-3074 (PAE)

Plaintiff,

v.

RICHARD SHRAGER and RICH FOODS 37,  
LLC,

Defendants.  
-----X

**MEMORANDUM OF LAW IN SUPPORT OF**  
**PLAINTIFF JONATHAN AGRAMONTE'S MOTION FOR**  
**LEAVE TO AMEND THE COMPLAINT**

Plaintiff Jonathan Agramonte, by and through his counsel at GARBARINI FITZGERALD P.C., respectfully submits this Memorandum of Law and annexed Declaration of Richard Garbarini, in support of his motion for leave to amend the initial pleading pursuant to Federal Rule of Civil Procedure 15(a)(2).

**PRELIMINARY STATEMENT**

Plaintiff seeks to amend the Complaint for the sole purpose of withdrawing claims for over-time and spread-of-hours pay brought pursuant to the Fair Labor Standards Act and New York Labor Law. (see Proposed First Amended Complaint, Garb. Dec. Ex. A). Plaintiff filed the initial pleading seeking to redress patent violations of the wage provisions of the fair labor standards Act and "off-clock" hours, as well as to recover expenditures for tools-of-the-trade, illegal uniform expenses and gratuities retained by the Defendants on April 30, 2014,

individually and on behalf of all similarly situated employees, against the Defendants RICHARD SHRAGER and RICH FOODS 37, LLC. (Dkt. No. 1). The facts adduced to date show the Defendants paid Plaintiff below minimum-wage, but require the withdrawal of claims related to over-time and spread-of-hours pay. Plaintiff seeks leave to file his First Amended Class and Collective Action Complaint to conform to these newly discovered facts pursuant to this Court's order dated July 25, 2014, and the Fed.R.Civ.Pro. 15(a)(2).

### **ARGUMENT**

#### **I. THE COURT SHOULD GRANT LEAVE TO AMEND PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 15(a)(2)**

“The Federal Rules of Civil Procedure contemplate liberal pleading and leave to amend the pleadings is ‘freely given when justice so requires.’ The decision whether to permit or disallow an amendment of a complaint is within the district court's discretion. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971), reh'g denied, 401 U.S. 1015 (1971); Fed. R. Civ. P. 15(a). Leave to amend should be permitted in the absence of undue delay, bad faith, or undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178 (1962); *Richardson Greenshields Securities Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987).

The facts adduced to date indicate Plaintiff was paid an illegal base rate of \$5.00 per hour, and was not even paid minimum wage with the inclusion of tips. Plaintiff apparently did not work more than 10 hours in any given day, or more than 40 hours in any given week. In light of this, Plaintiff cannot maintain causes of action for spread-of-hours pay under the New York Labor Law or for over-time violations pursuant to the Fair Labor Standards Act or New York Labor Law. Counsel for Plaintiff contacted Jeffrey Meyer, counsel for all Defendants, by phone and e-mail, and attempted to get the consent of the Defendants to file the subject Proposed First Amended Complaint. Garb. Dec. at ¶ 2; Ex. A. To facilitate consent, a Stipulation of

Consent and the Proposed First Amended Complaint were forwarded to counsel for the Defendants. Garbarini Dec. at ¶ 3. On July 28, 2014, messages were left for Yale Pollak and Jeffrey Meyer. Garbarini Dec. at ¶ 4. No response was received from either of the aforementioned counsel. Garbarini Dec. at ¶ 5.

Time is of the essence to file the Proposed First Amended Complaint. It is imperative Plaintiff seek an Order tolling the statute of limitation for wage violations under New York Labor Law. To this end, a Motion for Conditional Certification and to toll the statute of limitation has been prepared based on the filing of the annexed proposed pleading. The discovery requests served on Defendants will also be impacted by the resolution of the Motion for Conditional Certification.

Plaintiff respectfully requests this Court allow the Plaintiff leave to file the Proposed First Amended Complaint.


### **CONCLUSION**

For the foregoing reasons, Plaintiff respectfully submits that this Court should grant Plaintiff leave to amend the First Amended Complaint.

Dated: New York, New York  
July 28, 2014

Respectfully submitted,

GARBARINI FITZGERALD P.C.

By:   
Richard M. Garbarini  
rgarbarini@garbarinilaw.com  
420 Lexington Ave, Suite 2743  
New York, New York  
Phone: 212.300.5358  
Fax: 888.265.7054

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that on July 28, 2014, a true and correct copy of the foregoing  
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF JONATHAN AGRAMNOTE  
MOTION FOR LEAVE TO AMEND THE FIRST AMENDED COMPLAINT was served on  
the following counsel of record via this Court's ECF system:

Jeffrey Meyer  
Yale Pollak  
Kaufman Dolowich  
135 Crossways Park Drive  
Suite 201  
Woodbury, NY 11797

*Attorneys for Defendants*

Dated: July 26, 2014

GARBARINI FITZGERALD P.C.

By:   
Richard Garbarini